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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 360

THE UNITED STATES, APPELLANT

vs.

DANIEL NOCE

APPEAL FROM THE COURT OF CLAIMS

for Stipulation of C. J. Campbell

FILED APRIL 15, 1924

(30274)

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES, APPELLANT

vs.

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APPEAL FROM THE COURT OF CLAIMS

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In Court of Claims of the United States

CAPTAIN DANIEL NOCE, PLAINTIFF,
vs.
UNITED STATES OF AMERICA, DEFENDANT. } No. B.152

I. Petition. Filed July 25, 1922

To the honorable the Chief Justice and the Judges of the Court of Claims of the United States:

The plaintiff, Daniel Noce, respectfully represents:

1. That he is a citizen of the United States and an officer of the Regular Army of the United States, at present holding the rank of Captain in the Corps of Engineers; that he has at all times borne true allegiance to the Government of the United States and has not at any time in any way aided, abetted or given encouragement to rebellion against said Government; that he is the sole owner of the claim hereinafter stated; that no part of said claim has ever been sold, assigned or discharged.

2. That he was duly appointed a cadet at the United States Military Academy, West Point, State of New York, and having subsequently thereto passed the examination required by law, and having taken the oath of office prescribed by law for cadets in the military service of the United States, and having (with the consent of his parents) signed articles of engagement for service in the Army of the United States for a term of eight years, unless sooner discharged, and having complied with all the requirements of law to entitle him to the rights and privileges incident to the rank of cadet in the military service of the United States, he received his warrant as such cadet, and that in such capacity and by virtue of his said appointment as a cadet, he was duly admitted to the United States Military Academy at West Point, New York, on August 1, 1913.

3. The plaintiff further says that he served in the Army of the United States, to wit, as a cadet at the United States Military Academy at West Point, New York, from the said August 1, 1913, to April 20, 1917, when having been duly graduated, he was promoted, appointed and commissioned a second lieutenant in the Corps of Engineers of the Regular Army of the United States; that afterwards on May 15, 1917, he was duly appointed and commissioned as a first lieutenant in the said Corps of Engineers, and in like manner on said May 15, 1917, he was duly appointed and commissioned as a captain in said Corps of Engineers, which office he has ever thereafter held and now holds; that on August 23, 1918, he was duly appointed and commissioned as a major of Engineers, United States Army, emergency establishment, and accepted said commission September 4, 1918, which said office he held until June 30, 1920, when he was honorably discharged therefrom and reverted to service under his commission as captain in the Corps of Engineers, Regular Army,

as aforesaid; that he duly accepted all and singular the offices to which he has been appointed and commissioned as herein set forth and has always faithfully discharged the duties thereby imposed upon him, and that he has remained continuously in the military service of the United States since he entered the United States Army as a cadet at the United States Military Academy at West Point New York, on August 1, 1913, as aforesaid.

4. The plaintiff further says that Section 1262 R. S., provides as follows:

3 "There shall be allowed and paid to each commissioned officer below the rank of brigadier general, including chaplains and others having assimilated rank or pay, 10 per centum of their current yearly pay for each term of five years of service."

Section 11 of the act of Congress of May 18, 1920, entitled "An Act to increase the efficiency of the commissioner and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service" provides:

"That in lieu of compensation now prescribed by law, commissioned officers of the Coast and Geodetic Survey shall receive the same pay and allowances as now are or hereafter may be prescribed for officers of the Navy with whom they hold relative rank, as prescribed in the act of May 22, 1917, entitled 'An act to temporarily increase the commissioned and warrant and enlisted strength of the Navy and Marine Corps, and for other purposes,' including longevity; and all laws relating to the retirement of commissioned officers of the Navy shall hereafter apply to commissioned officers of the Coast and Geodetic Survey: *Provided*, That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services."

Plaintiff represents that in computing his service for longevity pay he is entitled, by virtue of said 1262 R. S. and said act of Congress of May 20, 1920, to count or to have counted his period of service as a cadet at the said United States Military Academy.

5. Plaintiff further represents that he has been paid all pay due him as an officer of the Army of the United States as aforesaid except the additional pay for length of service, known as longevity pay, for the periods and in the amounts hereinafter set out; that in the computation of his pay as an officer of the Army as afore-

4 said, the Finance Department of the United States Army has refused and still refuses to allow him credit for his actual time of service and to pay him his longevity pay based upon such service as a cadet at the United States Military Academy in the military service of the United States from August 1, 1913, to April 20, 1917, which period he is entitled to count or have counted as a period of service upon which his longevity pay shall be based as provided by

law, whereby and by reason of the premises plaintiff has sustained and suffered loss in the sum of $467.66, the same being longevity pay which, as herein set out, is legally due him and which the Finance Department of the Army has refused and still refuses to pay him, for periods and in amounts as follows:

Longevity pay, for over five years of service, as major, Corps of Engineers, U. S. Army,

From May 18, 1920, to May 31, 1920	$10.00
From June 1, 1920, to June 30, 1920	25.00
As captain, Corps of Engineers, Regular Army,	
From July 1, 1920, to December 31, 1920	120.00
From January 1, 1921, to December 31, 1921	240.00
From January 1, 1922, to April 19, 1922	72.66

aggregating the said sum of $467.66, and plaintiff represents that there is now actually and justly due and owing to him as above specifically set forth the said sum of $467.66, exclusive of all offsets, counter-claims, and just grounds of defense in favor of the United States.

DANIEL NOCE,
Plaintiff.

ANSELL & BAILEY,
Attorneys for Plaintiff,
Albee Bldg., Washington, D. C.

5 Jurat showing the foregoing was duly sworn to by Daniel Noce, omitted in printing.

6 *II. General traverse. Entered Sept. 25, 1922*

No demurrer, plea, answer, counter-claim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Argument and submission of case

On June 11, 1923, this case was argued and submitted on merits by Mr. Samuel T. Ansell, for plaintiff, and by Mr. John G. Ewing, for defendant.

7 *IV. Findings of fact, conclusion of law and opinion of the Court by Campbell, Ch. J. Entered October 15, 1923.*

This case having been heard by the Court of Claims, the court upon the evidence makes the following

FINDINGS OF FACT

I

The plaintiff was appointed by the President a cadet at the United States Military Academy at West Point on August 1, 1913, and the

same day signed the following agreement: "I, Daniel Noce, of the State of Colorado, aged eighteen years and nine months, do hereby engage, with the consent of my mother, that from the date of my admission as a cadet of the United States Military Academy I will serve in the Army of the United States for eight years unless sooner discharged by competent authority," and took the required oath. He graduated from the United States Military Academy on April 20, 1917, and on the same day was appointed a second lieutenant in the Corps of Engineers of the United States Army, and was promoted to the grade of first lieutenant on May 15, 1917, and to that of captain in the same branch of the service on the same day. On August 23, 1918, plaintiff was appointed a major of Engineers in the emergency establishment of the United States Army, and was honorably discharged therefrom on June 30, 1920, and reverted to his grade of captain of Engineers, which office he still holds.

II

The plaintiff was paid by the proper disbursing officer from August 1, 1918, to April 30, 1922, without giving him credit for his service as a cadet from August 1, 1913, to April 19, 1917, inclusive, in computing his longevity pay.

III

Counting his cadet service from August 1, 1913, to April 20, 1917, plaintiff would be entitled to the sum of $467.66 as longevity pay from the date of the approval of the act of May 18, 1920, 41 Stat. 601, to April 19, 1922.

8 CONCLUSION OF LAW

Upon the foregoing findings of fact, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $467.66.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of four hundred and sixty-seven dollars and sixty-six cents ($467.66).

OPINION

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The question for decision is whether the time of service as a cadet at the West Point Academy is to be regarded as part of the officer's service in the Army for the purpose of longevity pay under the provisions of the act of May 18, 1920, 41 Stat. 601, section 11 of which reads as follows:

"That in lieu of compensation now prescribed by law, commissioned officers of the Coast and Geodetic Survey shall receive the same pay and allowances as now are or hereafter may be prescribed for officers of the Navy with whom they hold relative rank as prescribed in the act of May 22, 1917, entitled 'An act to temporarily

increase the commissioned and warrant and enlisted strength of the Navy and Marine Corps, and for other purposes,' including longevity; and all laws relating to the retirement of commissioned officers of the Navy shall hereafter apply to commissioned officers of the Coast and Geodetic Survey: *Provided*, That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services."

As tending to shed some light on the meaning of this proviso reference may be had to the act of June 4, 1920, 41 Stat. 759, 785, amendatory of the National Defense Act, and for other purposes, passed shortly after the act of May 18, in which under the head of "Miscellaneous provisions," contained in section 127a, appears the following:

"In determining relative rank and increase of pay for length of service and, in the case of officers of the Regular Army, in determining rights of retirement, active duty performed while under appointment from the United States Government, whether in the Regular, provisional, or temporary forces, shall be credited to the same extent as service under a Regular Army commission."

Since the decisions in *Morton's case*, 112 U. S. 1, and *Watson's* case, 130 U. S. 80, it is not to be doubted that the time of the service of a cadet in the Military Academy is to be regarded as a part of the time of service in the Army and to be counted in computing his longevity pay except where the officer is deprived of this right by the act of 1912, hereafter mentioned. In *Morton's case* it appeared that the accounting officers of the Government in dealing with the officer's pay under section 1262, Revised Statutes, allowed only for length of service as a commissioned officer in the Regular Army. The act of June 18, 1878, 20 Stat. 150, having provided that officers who had served as enlisted men should be credited with that
9 service "in computing their service for longevity pay," the practice was not to regard an officer who had served as a cadet as thereby having served as an enlisted man in the Army. The Army appropriation act for the year ending June 30, 1882, and the similar act for 1883, 21 Stat. 346, and 22 Stat. 117, carried a provision to the effect that additional pay should be allowed officers for length of service, to be paid with their current monthly pay, and provided that "actual time of service in the Army or Navy, or both, shall be allowed all officers in computing their pay."

The point of contention, therefore, in the *Morton case* in the Court of Claims was stated to be in connection with the words "actual time of service in the Army," 19 C. Cls. 200, 204. From this court's judgment the Government appealed, and as appears in the Supreme Court's opinion, the only question for decision was whether the time of service as a cadet is to be regarded as actual time of service in the Army. That court decided that a person serving as a cadet was serving in the Army, and that the time during which Morton was serving as a cadet was therefore "actual time of service by

him in the Army." After this decision the *Watson case supra* arose. It was held that the officer was entitled to have counted as service in the Army the time of service as a cadet within the meaning of the act of July 5, 1838, 5 Stat. 256. These decisions were rendered in 1884 and 1888, respectively, and from that date until the act of 1912 the Army appropriation acts have made appropriations for longevity pay under provisions of substantially similar import, as follows: "For additional pay to officers for length of service, to be paid with their current monthly pay." The ruling in the *Morton case* has been consistently applied, the service as a cadet being recognized as a part of the "service" entering into the length of service of an officer of the Army. But in the act of August 24, 1912, 37 Stat. 569, 594, making appropriation for the Army, there is a provision contained in section 6 of the act as follows:

"That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy or to the Naval Academy shall not be counted in computing for any purpose the length of service of any officer of the Army."

This enactment effectually disposed of the rule stated in the cases of *Morton* and *Watson supra*, so far at least as those officers coming within its terms were concerned. Forbidding the counting of the service of a cadet appointed after the act was passed "in computing for any purpose the length of service," the enactment had the effect of removing from consideration the cadet service of those appointed after the date of the act, in computing longevity pay. Whether the plaintiff is entitled to recover in this case must depend therefore upon the meaning of legislation subsequent to the act of 1912. We have quoted section 11 of the act of May 18, 1920, containing the proviso upon which the plaintiff relies. The purpose of the entire act is to increase the pay of officers of the Army, Navy, and other branches, and section 11 relates primarily to officers of the Coast and Geodetic Survey. Inasmuch as it provides for their rank and pay, "including longevity," it seems manifest that the proviso declaring that "hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services" must have a broader purpose and more extended application than the part of the section which precedes it and relates to one branch. That it states a basis for computing longevity pay in other branches than the Coast and Geodetic Survey is manifest; and if this act stood alone there would be no difficulty in arriving at the conclusion that its plain import is that any service in either of the enumerated branches is to be counted in computing the length of an officer's service for the purposes of longevity pay.

In the instant case, as in the *Morton case*, the cadet's engagement was "to serve eight years, unless sooner discharged" (Rev. Stat., sec. 1321). Morton entered the academy as a cadet July 1, 1865. Speaking of his engagement, the Supreme Court say that it is a cir-

cumstance of weight to show that the Government from the beginning treated the plaintiff as serving in the Army. "The service for which he engaged," say the court, "began on the 1st of July, 1865, and the eight years ran from that time." See *Watson's case*, 130 U. S. 80, 82. Similarly Noce's eight years of service began when he entered the academy under appointment in 1913. This would require service as a cadet to be counted under the ruling of the *Morton* and *Watson cases*. The act does not expressly repeal the earlier act of 1912, or that of 1913, 37 Stat. 891, and whether they, or either of them, are impliedly repealed depends upon whether all may be given effect or are so inconsistent or repugnant that the acts of 1912 and 1913 must, at least to the extent of the repugnancy, yield to the later enactment. In *Tynen's case*, 11 Wall. 88, 92, the rule is thus stated:

"When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

See *The Paquette Habana*, 175 U. S. 677, 685; *Cook County Bank v. United States*, 107 U. S. 441, 445.

The act of 1912 provides that service as a cadet at West Point of those appointed *after the date of the passage of the act* shall not be counted in computing for any purpose the length of service of any officer. As already shown, service at the Academy had been construed to be military service for the purposes of longevity pay under an act authorizing the computation to be based on the "actual" time of service. *Morton case*. That case points out a number of statutes showing that "cadets at West Point were always a part of the Army," and this condition continues under the National Defense Act of 1916, 39 Stat. 166, and the amendatory act of 1920, 41 Stat. 759, a provision from which is quoted in the earlier part of this opinion. Both of these acts (section 2) recognize the cadets of the United States Military Academy as part of the Regular Army of the United States.

The Government's contention that under the act of 1912 "a cadet in the United States Military Academy, while in military training there as a student, is not a person serving in the military or naval forces of the United States," can not be sustained because of the decisions above mentioned and for the further reason that it is based upon an erroneous interpretation of the act. This act of 1912 by its terms applies to cadets appointed subsequent to its enactment, and it does not purport to affect the longevity pay of those officers who had been appointed cadets prior to its passage. Nor does it declare that the service of cadets is not service in the Army. On the contrary, it speaks of "service" and length of service. The same word is used in the act of 1920. As was said in *Watson's*

case, supra, in referring to words used in the act of 1881 and that of 1838, "they both mean the same kind of service." The act of 1912 did not limit the meaning of service, but its effect was to carve out of the entire service of the officer that period of service passed at the Military Academy in counting the length of service for any of the purposes, as, for instance, the purpose of lineal rank, or of retirement, as well as for the purpose of longevity pay. It refers to any purpose, while the later act is limited to one purpose—that of providing a basis for computing longevity pay. The act of 1912 specifies that the cadet service shall not be counted in computing length of service for any purpose. The act of 1920 is limited to the question of longevity pay. It may be said, therefore, to form an exception to the more general statement in the act of 1912. See *Rodgers v. United States*, 185 U. S. 83, 89. "The total of all service" in the Army includes service at the Military Academy under the authorities mentioned, and this "total of all service" is the basis for longevity pay for officers in the Army according to the act of 1920. This requires all service to be counted, while the act of 1912 forbids a part of the service being counted. We can not find the total of all service by excluding part of the service from the computation; and service as cadet is part of the service in the Army. *Morton case; Watson case;* see also *Hartigan case*, 196 U. S. 169, 174; *Baker case*, 125 U. S. 646; *Cook case*, 128 U. S. 254. It seems to us that the proviso in the act of 1920 above quoted is inconsistent with the act of 1912 so far as the basis of computing length of service for longevity pay is concerned, and that the earlier must yield to the later enactment.

The history of the act of May 18, 1920, in its passage by Congress sustains the view we have taken of the meaning of the proviso in section 11. A bill (H. R. 11927) was passed by the House and sent to the Senate, where it was substantially amended. It was afterwards sent to conference. Its title as it passed the House was "A bill to increase the efficiency of the personnel of the Navy and Coast Guard through the temporary provision of bonuses or increased compensation." Many of its provisions were changed in conference and the conference report was adopted. (See Cong. Rec., 66th Cong., 2d sess., vol. 59, pt. 7, pp. 7048–51.) The title had been changed by the Senate, and as changed was agreed to, so that it read "An act to increase the efficiency of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service," thus materially enlarging the scope of the original bill.

In their statement to the House by the managers on the part of the House it was said: "This amendment in title is agreed to
12 since it more aptly describes the scope of the legislation as amended and agreed to." Plainly it affected all branches of the military service. Section 11, providing for the Coast and Geodetic Survey, was section 5 of the Senate amendment (vol. 59, pt. 3, Cong. Rec., p. 2251). But the proviso in question was additional to that amendment and was inserted in conference. The section deals

primarily with the Coast and Geodetic Survey, and gives them the pay and allowances prescribed for officers of the Navy "with whom they hold relative rank," as prescribed in the act of May 22, 1917, "including longevity." In explanation of this section the managers on the part of the House reported "it also contains a proviso placing all the service on an equality in the matter of computation of longevity or service pay." There was an inequality of longevity pay of officers whose appointments as cadets were prior to 1912 and those whose appointments were subsequent to 1912. The service of a cadet appointed in 1911 could be counted for the purpose of longevity, but the service of a cadet appointed after the act of 1912 could not be counted for any purpose in computing his length of service. Section 11 provides for pay for officers in the Coast and Geodetic Survey by prescribing the same pay and allowances that are prescribed for the officers of the Navy with whom they hold relative rank, and this same distinction in longevity pay required by the act of 1912 in the case of Army officers is also required in the case of naval officers by the act of 1913 above mentioned, which fact would ultimately lead to confusion and inequality in the pay of the officers in the Coast and Geodetic Survey holding relative rank.

The Supreme Court, in deciding the *Hartigan case*, *supra*, said it was not a question whether the cadet at West Point was an officer in the Army. It concedes that his service as a cadet was actual time of service in the Army, within the meaning of the statute giving longevity pay to officers. However, in the *Baker case*, 125 U. S. 646, it is held that a midshipman at the Naval Academy is an officer of the Navy, and serving as such, though continuing to be a student in the Naval Academy, and that his service as midshipman entitled him to longevity pay. In the *Cook case*, 128 U. S. 254, where the same general question arose, it is said "that a midshipman is an officer has been understood ever since there was a Navy." But, as already stated, the question is not whether a cadet at West Point is an enlisted man within the meaning of the statutes, but whether his service as cadet is service in the Army, and this question has been resolved affirmatively by the cases mentioned.

Our conclusion is that the plaintiff is entitled to recover, and judgment should be awarded in his favor. It is so ordered.

GRAHAM, *Judge;* DOWNEY, *Judge*, and BOOTH, *Judge*, concur.

13 *V. Judgment*

At a Court of Claims held in the city of Washington on the fifteenth day of October, A. D. 1923, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge, and decree that the plaintiff shall have and recover of and from the United States the sum of four hundred and sixty-seven dollars and sixty-six cents ($467.66).

By the Court.

VI. History of proceedings after entry of judgment

On December 8, 1923, the defendant filed a motion for a new trial.

On March 3, 1924, the court overruled said motion and filed the following order:

It is ordered by the court that the defendant's motion for new trial be, and the same is, overruled.

Judge Hay dissents.

Entered March 3, 1924.

VII. Petition for appeal. Filed March 31, 1924

From the judgment rendered in the above-entitled cause on the 3d day of March, 1924, in favor of plaintiff, the defendant, by its Attorney General, on the 31st day of March, 1924, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

VIII. Order allowing appeal. April 7, 1924

It is ordered by the court this 7th day of April, 1924, that the defendant's application for appeal be, and the same is, allowed.

14 In Court of Claims

Clerk's certificate

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Campbell, Chief Justice; of the judgment of the court; of the defendant's application for appeal to the Supreme Court of the United States; and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City, this ninth day of April, A. D. 1924.

[SEAL]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

[Endorsed on cover: File No. 30,274. Court of Claims. Term No. 360. The United States, appellant, *vs.* Daniel Noce. Filed April 15th, 1924. File No. 30,274.]

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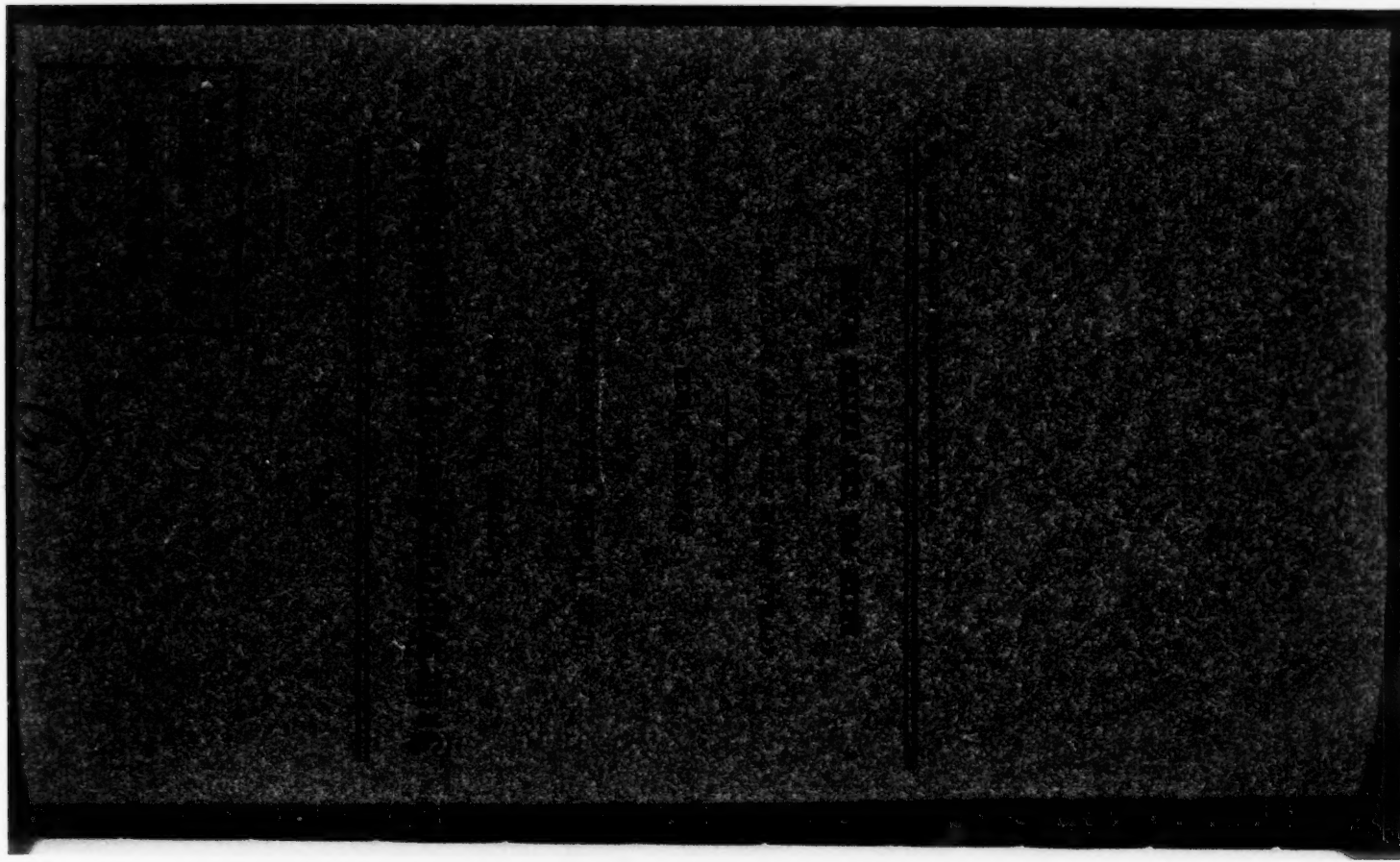

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In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, APPELLANT
v.
DANIEL NOCE
No. 360

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

The appellee is an officer in the Army who was appointed a cadet at the West Point Military Academy August 1, 1913. He graduated from the Academy April 20, 1917. Counting his cadet service from August 1, 1913, to April 20, 1917, appellee would be entitled to the sum of $467.66 as longevity pay from the date of approval of the Act of May 18, 1920, hereinafter set out, to April 19, 1922, the period covered by this claim.

The Court of Claims found as a conclusion of law that appellee's cadet service *should be counted* and awarded him the amount claimed. The United States opposed the claim, and now opposes it, on the ground that the Act of August 24, 1912, 37 Stat.

569, 594, expressly provides that cadet service "*shall not be counted in computing for any purpose the length of service of any officer of the Army.*"

The appellee contended and it was the opinion of the Court of Claims (Judge Hay dissenting to the Court's action in overruling the motion for a new trial. Page 10 of the Record) that this Act of 1912, in so far as it affected the longevity rights of Army officers, was impliedly repealed by the proviso in the 11th section of the Act of May 18, 1920, 41 Stat. 601, 603.

Whether the Act of 1920 did impliedly repeal that of 1912 is the sole question in the case.

The pertinent provision of the Act of 1912 is as follows:

> That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy, or to the Naval Academy, shall not be counted in computing for any purpose the length of service of any officer of the Army.

A similar provision was incorporated in the Act of March 4, 1913, 37 Stat. 891. It read:

> Hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet at the United States Military Academy, who may hereafter be appointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the naval or in the Marine Corps.

The pertinent provision of the Act of 1920 is as follows:

> That in lieu of compensation now prescribed by law, commissioned officers of the Coast and Geodetic Survey shall receive the same pay and allowances as now are or hereafter may be prescribed for officers of the Navy with whom they hold relative rank as prescribed in the Act of May 22, 1917, entitled "An Act to temporarily increase the commissioned and warrant and enlisted strength of the Navy and Marine Corps, and for other purposes," including longevity: and all laws relating to the retirement of commissioned officers of the Navy shall hereafter apply to commissioned officers of the Coast and Geodetic Survey: *Provided*, That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services.

ARGUMENT

It will be conceded that appellee is not entitled to recover if the Act of 1912 has not been repealed so far as applicable to the longevity rights of Army officers. It will be conceded, also, that the Act of 1920 does not expressly repeal that of 1912. Appellee, then, can not recover unless it is held that the Act of 1912 is repealed by that of 1920 by implication.

The question will best be approached by a brief historical introduction to the Act of 1912.

Background of the Act of 1912

Successive acts providing for longevity pay to Army officers were those of July 15, 1838, 5 Stat. 256, c. 162, sec. 15; March 2, 1867, 14 Stat. 423, c. 145, sec. 9; July 15, 1870, R. S. sec. 1262 (the pertinent parts of all of which are quoted in *United States* v. *Watson,* 130 U. S. 80, 81). The longevity pay thus authorized was required by Acts of February 24, 1881, 21 Stat. 346, and June 30, 1882, 22 Stat. 118, to be calculated "upon the actual time of service in the Army." The United States contended this did not include service at the West Point Military Academy. (17 Op. A. G. 93.) This court held otherwise. (*United States* v. *Morton,* 112 U. S. 1; *United States* v. *Watson,* 130 U. S. 80.)

The *Morton case* was decided October 27, 1884, and the *Watson case,* reaffirming the principle of the *Morton case,* was decided March 11, 1889. Both were based on various Acts of Congress indicating, the Court said, the intent of Congress that service at West Point was to be treated as service in the Army. Thereafter, and until the Act of August 24, 1912, by virture of these decisions, Army officers who had been cadets at the Military Academy counted the time of their service there in calculating longevity pay. Therein they had a great advantage over those officers who had not had the benefit of free education at West Point. Congress regarded this as an unfair discrimination and therefore passed the Act of 1912.

The Act of 1912 originated as House bill 18956, Sixty-second Congress, second session. (The bill which was signed was No. 25531, identical with No. 18956 as to this section.) The report of the House Committee on Military Affairs (H. R. 270, p. 64, 62d Cong., 2d sess.) thus stated its purpose:

> Section 7 [afterwards altered to 6] of the bill also proposes that service as a cadet of the United States Military Academy, or as a naval cadet or midshipman, shall not be counted in computing for any purpose the length of service of any officer of the Army. In computing length of service of officers of the Army, in order to determine their right to the 10 per cent increase of pay that is allowed by law for each five-year period during 20 years of active service, it has been the practice of the War Department for a considerable number of years to count the time previously spent by such officers as pupils undergoing instruction, at the expense of the United States, as cadets of the Military Academy or as naval cadets or midshipmen, this instruction being for the purpose of enabling them to secure appointments as second lieutenants in the Army or as ensigns in the Navy. The result of this practice is that a graduate of the Military Academy who was appointed a second lieutenant, after having been educated for that appointment for four or more years wholly at the expense of the Government, receives his first 10 per cent increase of pay after not more than one year of service as a com-

missioned officer, whereas the second lieutenant who is appointed from civil life, after having been fitted for the appointment wholly at his own expense, must serve for five full years as a commissioned officer before he can receive his first 10 per cent increase of pay. And the same disparity between the two cases continues to the end, the graduate of the academy receiving each succeeding longevity increase of pay at least four years in advance of the officer appointed at the same time from civil life. Moreover, if, as is not infrequently the case, a cadet is retained at the academy for five years because of his inability to keep up with his class and complete the course in the prescribed four years, he receives his first longevity increase of pay immediately upon being graduated and commissioned as a second lieutenant. In other words, his own deficiency or inability as a student gives him an advantage of a year, in respect of service increase of pay, over those who were graduated and commissioned with him after completing the course in four years; and it gives him an advantage of five years over second lieutenants appointed from civil life. Former naval cadets or midshipmen, of whom a good many have been appointed second lieutenants in the Army, begin their military careers with an allowance of from four to six years' service for longevity pay purposes, and the advantage thus given them in this respect over graduates of the Military Academy and appointees from

civil life continues through all of the four periods for which increase of pay for length of service is allowed by law.

It is but just to say that this preposterous practice did not originate with the War Department. It was the result of a decision rendered by the Supreme Court October 27, 1884 (*Morton* v *United States*, 112 U. S., 1), to the effect that the time during which a person has served as a cadet is to be regarded as "actual time of service in the Army" within the meaning of the Army appropriation act approved February 24, 1881 (21 Stat. L. 346), which provided that "the actual time of service in the Army or Navy, or both, shall be allowed all officers in computing their pay." * * *

In addition to counting service as a cadet of the Military Academy in computing length of service for longevity increase of pay, such service is counted under the law authorizing the retirement of officers on their own applications after 30 years of service. The graduate of the Military Academy is eligible for retirement under that law after 26 years' service as a commissioned officer, whereas the officer appointed from civil life must serve 30 full years before his application for retirement under that law can be favorably considered. Similarly, cadet service is counted in determining the eligibility of officers for retirement under the law that requires that they shall be retired on their own applications after 40 years of service. These are additional

> discriminations against the civilian appointee who pays for his own preliminary education and in favor of the graduate of the Military Academy who is educated for his commission at the expense of the Government.

So the Act of 1912 prohibited counting West Point service in calculating longevity pay. Its purpose was to remove a gross discrimination theretofore existing. *Appellee now contends that Congress reestablished that discrimination by implication.*

Legislative history of the Act of 1920

Section 11 of the Act of 1920, upon the proviso in which the appellee relies, appears on its face primarily to be concerned with the compensation of commissioned officers of the Coast and Geodetic Survey. They are to receive the same compensation as officers of the Navy, with whom by the Act of July 22, 1917 (40 Stat. 88, sec. 16), they hold relative rank. That " same " compensation is to include longevity pay. Such is the substance of the section proper before the proviso.

When section 11 came originally from the House Committee which had the Bill in charge it did not contain the present proviso, but did contain a proviso to the effect that service in the Coast and Geodetic Survey should count in computing longevity or service pay of all officers of the Army or Navy. (See H. R. 11927, Calendar No. 375, 66th Cong., 2d sess., sec. 5.)

Obviously, in the proviso as thus framed, there was injustice and discrimination. It permitted the officer who had served in the Army or Navy to add to the service therein which he could count for longevity (and that did not include his service at West Point), his service in the Coast and Geodetic Survey, and upon the total thus attained to base his longevity pay. In other words, he might *combine* the services in these two different branches. This was right and proper; but other combinations of services for longevity pay were not, generally speaking, possible. The provision for longevity in each branch was separate and allowed no inclusion of service in any other branch in the calculation of longevity. Thus, before the proviso, those officers in the Coast and Geodetic Survey who had had service with the Army and Navy during the war were not entitled to credit for service in the military branches. So, also, were Public Health officers denied credit for service in the Army or Navy, and while Coast Guard officers were entitled to credit for service in the Army, Navy, and Marine Corps (sec. 2, Act of January 28, 1915, 38 Stat. 800, 802), Army, Navy, or Marine Corps officers were not entitled to credit for service in the Coast Guard or the Revenue Cutter Service (25 Com. Dec. 104); and Army, Navy, or Marine Corps officers were not entitled to credit, for longevity pay, for services rendered in the Public Health Service or Coast and Geodetic Survey.

If now, as by the proviso first presented, the Army or Navy officer in calculating his longevity was to be permitted to include service in the Coast and Geodetic Survey, then it was but just that other combinations should likewise be so treated. To accomplish that, the proviso as adopted was substituted by a conference committee for the proviso as first presented. So that, under it, any service in any branch which might be counted for longevity might thereafter be added to any service in any other branch which might be counted for longevity. The change effected by the proviso and the only change intended was, as we think this legislative history shows, that by it for the first time *combination* of all services in calculating longevity became possible. There is no reason whatever for believing that Congress intended to change *the basis within any service* upon which longevity was to be calculated, and, thereby, to reestablish the discrimination against other than West Point officers in the Army which Congress had vigorously condemned and effectually removed by the Act of 1912.

The report of the managers on the part of the House after the conference which framed section 11 in its present form says merely of section 11 and its proviso (H. R. 948, 66th Cong., 2d session):

> Section 11 is substantially the same as section 5 of the Senate amendment. It provides that commissioned officers of the Coast and Geodetic Survey, a highly technical and specialized service, shall receive the same

> pay and allowances as are prescribed for officers of the Navy with whom they hold relative rank, as prescribed in the Act of May 22, 1917. *It also contains a proviso placing all services on an equality in the matter of computation of longevity or service pay.* (Italics ours.)

The sole purpose of the proviso as thus explained by the managers for the House was to "*place all the services on an equality in the matter of computation of longevity or service pay.*" How equality was achieved we have pointed out. But in what way would equality have been promoted by giving to a part of the officers in certain services an unfair advantage not enjoyed by all the officers in any service nor by any of the officers in some of the services? Again, in what way would equality have been promoted by reestablishing a special privilege once enjoyed by graduates of the Academies and which Congress by two Acts had expressly taken away because based on inequality?

To some extent in its opinion the court below relies upon this same report (Record, p. 9), but how incorrectly! The opinion, at least as set out in the record at page 9, inadvertently, of course, *misquotes* the report and then bases its argument on the misquotation. The report is quoted as saying, "it" (that is, section 11) "contains a proviso placing all the *service* on an equality * * *" The court then says, in substance: "Very well, within the service in the Army there is inequality,

since those whose appointments as cadets were before 1912 may count their cadet service for longevity, but those can not whose appointments were subsequent to 1912. It is that inequality that is referred to." But what the managers in their report said was that " it contains a proviso placing all the *services* on an equality." It was not then any inequality *within a service* that was aimed at, but an *inequality between services.*

In connection with this report we add that it is amazing that the managers, although making specific reference in their report not only to section 11, but to the proviso, omitted to call attention to the fact that it repealed two Acts of Congress and overturned the established policy of the United States with regard to the exclusion of service in the Academies from calculation of longevity. *That is, it is amazing, if there were actually any such intent.*

There is nothing in any report of any committee, in the official record of any committee hearing, or in the record of any debate in Congress, to indicate that anyone contemplated that in enacting this proviso in the form in which it is found in the Act there would be worked an implied repeal of section 6 of the Act of 1912. This too is amazing in view of the obvious fact that any such intention would naturally have met with violent opposition from a large number of officers against whom it would have discriminated.

The legislative history of the Act of 1920 fully corroborates the government's present contention

as to its true meaning. It is utterly irreconcilable with the appellee's contention that Congress intended to repeal the Act of 1912.

Repeals by implication not favored

It is, of course, well recognized that repeals by implication are not favored. The rule is stated thus in Black on Interpretation of Law, second edition, par. 107:

> Repeals by implication are not favored. A statute may not be construed as repealing prior acts on the same subject (in the absence of express words to that effect), unless there is an irreconcilable repugnance between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on that subject.

This court said in *United States* v. *Greathouse*, 166 U. S. 601, 605, speaking through Mr. Justice Harlan:

> But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. *Frost* v. *Wenie* (157 U. S. 46, 58); *U. S.* v. *Healey* (160 U. S. 136, 147).

In *Frost* v. *Wenie*, 157 U. S. 47, 58, cited by the court in the *Greathouse* case, the court's language was:

> It is well settled that repeals by implication are not to be favored. And where two

> statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the *whole subject*, and, therefore, to displace the prior statute.

To the same effect is *United States* v. *Yuginovich et al.*, 256 U. S. 450, 463.

Here there is no difficulty in giving effect to both the Acts of 1920 and 1912. Obviously the great purpose (we think the sole purpose) of the proviso in section 11 of the Act of 1920 was to permit services in different branches to be combined in the calculation of longevity. But there is no inconsistency between that purpose and the purpose of section 6 of the Act of 1912. It is only by straining out of the proviso in section 11 of the Act of 1920 an implied and, certainly it must be conceded, an incidental purpose, aside and apart from its chief purpose, that anything is found in the Act of 1920 inconsistent with the Act of 1912. But if repeals by implication are not favored, it is not likely that the court will hold that an Act of Congress has been impliedly repealed by what can be urged only as a possibly secondary and incidental intent labori-

ously extracted from language, the primary intent of which is perfectly clear and perfectly consistent with the intent of the Act said to be repealed.

The language of the Act of 1920

Even if we did not have the light of the legislative history of the Act of 1920 and the benefit of the rule against repeals by implication, and if the words of section 11, including the proviso, stood alone, we submit that these words, standing alone, do not show an intent to change the basis *within any service* upon which longevity is to be calculated therein.

We set out again the words of the proviso. They are:

> *Provided*, That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services.

The subject of the sentence is "longevity pay." Longevity pay to whom? To officers in the Army alone? No. To all officers, whether graduates or not of the Academies, in all of six separte services, including several services not normally preceded by Academy training. The basis of longevity pay by virtue of the proviso is "*hereafter*" to be changed from what it was *heretofore*, for the benefit of *all officers of all these services who have served in more than one branch*. But the only change

of *basis* having such a general application would
a change allowing " *hereafter* " the *totaling* of se
ices in two or more branches. So *that* was t
change of *basis* which the proviso effected, no
change *within* a single branch benefiting only t
officers of that branch and only some of them.

" *Hereafter* " longevity pay is to be based "
the *total* of *all* service in *any* or *all* of said service
The word " any " does not here mean " any on
It means " some " or " any two or more." T
latter is one of the meanings of " any " recogniz
by the lexicographers. (See Standard Dicti
ary.) That such is the meaning in which the w
" any " is used here follows from the fact that
is the " *total* " of " all " service in " any " * *
services that is to be the basis of longevity p
" Total " implies two or more added together.

The new thing effected was this " *totaling* "
terms of service in two or more " services."

Longevity pay was already allowed for the f
period of service *within* any single service.
least that was true as to each of the six servi
except the Army and Navy, as to which two servi
Congress had excluded Academy service from c
culation, and it was true as to actual Army a
Navy service as distinguished from this period
preparation therefor. Since within any giv
service longevity was already allowed for
service, the words " *total of all service* " could
have been used as referring to the sum of t
periods in the same service.

The court below construes the Act of 1920 as if it read: "hereafter longevity pay for officers in the Army shall be based on the total of all service in the Army"; in other words, as if there were no context to affect the meaning or evidence the intent of Congress. Whereas it is the context, which refers to all the services, that alone gives rational significance to the proviso. That will appear conclusively if we substitute for the proviso as it stands six separate sentences, each dealing with a single service in the same manner in which the court below construes the proviso as dealing with Army service. The meaning of a paragraph so composed would be entirely different from that of the proviso as it stands. The intent of the proviso as it stands, that "hereafter" two or more services may be *totaled,* would be wholly unexpressed by such a reconstructed paragraph. So that we say again: It is only when the obvious intent of the *whole* proviso is ignored and a minor intent is painfully squeezed out of a *single phrase* in the proviso that anything is found which may be said to be repugnant to anything in the Act of 1912.

Certainly it would have been easy to have used words expressly repealing the Act of 1912, in so far as it related to longevity, if Congress had any such intent. The fact that they were not used is strong proof of the absence of that intent.

Academy service not Army service

There is still another argument against the conclusion reached below and urged by appellee here.

Even if the words " total of all service," as used in the Act of 1920, refers, among other things, to the " total of all service " *in* the Army, still, service at the Academy is not service in the Army.

When we make that assertion we are met at once with the decisions of this court in the *Morton* and *Watson* cases, supra. But this court did not decide that service at the Academy was *ipso facto* service in the Army. This court decided merely that under then existing legislation it was service in the Army, but the court clearly recognized that it was for the Congress to say what should be service in the Army.

If, after the *Morton* and *Watson* decisions, the Congress had by law decreed that service at the Academy was not service in the Army, certainly no one would now contend that by reason of those decisions an Act referring to " service in the Army " necessarily included service at the Academy. Yet that is precisely what the Congress did decree.

The history of the Act of 1912, hereinbefore set out, as well as the language of that Act, indicates the clear intent of the Congress that thereafter service at the Academy is not to be construed as Army service. Such is the meaning of the words used: (such service) " shall not be counted in computing for any purpose the length of service of any officer of the Army." This court had said: " The language used by the Congress hitherto in its

various Acts indicates that the Congress intended Academy service to be treated as Army service." To that the Congress in the Act of 1912 made reply: "If our language in the past justifies that construction, let us clear the matter up now once for all by saying that hereafter Academy service is not to be counted for any purpose in computing length of Army service."

Suppose there had been no *Morton* or *Watson* decision and the question was now for the first time presented to this court as to whether Academy service should be included in a claim for longevity pay under an act providing that an officer should have such pay based on his service in the Army. Would not this court refer to the Act of 1912 as conclusively determining the matter? If so, then why not now, since the *Morton* and *Watson* cases have no authority other than as declaring the intent of the Congress prior to 1912, at which time the Congress itself expressly declared its intent touching the question.

It might be conceded that for some purposes Academy service is still Army Service. But that concession does not weaken this argument that it is not Army service within the meaning of Acts dealing with longevity. In the light of one Act it may be Army service, in the light of another not. (*Hartigan* v. *United States,* 196 U. S. 169, 171.)

The Act of 1922

Finally light is thrown on what was intended by the Act of 1920 by what was done by Congress in 1922. Reference is to the Act of June 10, 1922 (42 Stat. 625, 627). One paragraph thereof (page 627) reads as follows:

> For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay, and service as a contract surgeon serving full time; and also 75 per centum of all other periods of time during which they have held commissions as officers of the Organized Militia between January 21, 1903, and July 1, 1916, or of the National Guard, the Naval Militia, or the National Naval Volunteers since June 3, 1916, and service as a contract surgeon serving full time, shall be included in the computation.

If the Congress by the Act of 1920 intended that Academy Service should be counted for longevity pay, then the Congress by the Act of 1922 abandoned that idea as to all Army officers thereafter coming into the service. The Act of 1922 says that "For officers appointed on and after July 1, 1922, *no* service shall be counted for purposes of pay ex-

cept active commissioned service." (Service at the Academies is not active commissioned service. *Hartigan* v. *United States,* 196 U. S. 169.) One would think that if in 1922 the Congress intended to abandon a policy it had impliedly reestablished in 1920, at least some discussion would have been provoked. But no, in the legislative history of the Act of 1922 there is not a word to indicate that anyone in the Congress knew that the Congress had in 1920 changed the law as to service in the Academies being excluded from calculation of longevity and was now once more reversing its position. On the contrary, in the legislative history of the Act of 1922 what reference there was to the Act of 1912 (and that occurred in the debates) indicated the belief that it was still in force. (Address of Mr. Oliver, vol. 62, pt. 7, Congressional Record, p. 6758, second column.) In one of the hearings on the Act it had been stated by an officer of the Army in answer to a question by a member of the House of Representatives, Mr. Oliver, that the Act of 1912 cut out cadet service from the calculation of longevity. (Hearings before House committee on H. R. 10972, pp. 52 and 53.)

Moreover the text of the Act of 1922 is inconsistent with the theory that Congress in 1920 had ordained that Academy service was to be included in calculating longevity. The Act provided that "For officers in the service on June 30, 1922, there shall be included in the computation all service

which is now counted in computing longevity pay." But, despite the Act of 1920, Academy service was not then being counted. If the Congress in 1920 intended to reestablish Academy service on the pre-1912 basis, the Government was flouting that intent. Certainly, if ever there was such intent, *now was the time to make it clear beyond all possibility of doubt*. That was not done. The Congress merely said in substance, longevity shall continue to be calculated as now as to all officers in service on June 20, 1922.

CONCLUSION

We respectfully submit that for the reasons we have hereinbefore set out the judgment of the court below should be reversed.

JAMES M. BECK,
Solicitor General.
MERRILL E. OTIS,
Special Assistant to the Attorney General.
MARCH, 1925.

○

IN THE

Supreme Court of the United States

October Term, 1924.

No. 360.

THE UNITED STATES, *Appellant,*

vs.

DANIEL NOCE.

APPELLEE'S BRIEF.

SAMUEL T. ANSELL,
EDWARD S. BAILEY,
Attorneys for Appellee.

Washington,
April, 1925.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In The

Supreme Court of the United States

October Term, 1924

The United States, *Appellant*
vs.
Daniel Noce
} No. 360

APPELLEE'S BRIEF

Statement of Case

The question is whether by virtue of the following proviso to Section 11 of the Act of May 18, 1920 (41 Stats. 401),

> "That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, Coast and Geodetic Survey, shall be based on the total of all service in any or all of said services,"

appellee, after the date of approval of said act, is entitled to count his West Point cadet service for longevity pay, notwithstanding the so-called Hay Provision in the Army Appropriation Act of August 24, 1912 (37 Stats. 594), as follows:

> "That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy, or to the Naval Academy, shall not be counted for computing for any purpose the length of service of any officer of the Army."

The Court of Claims (58 Ct. Cls. 688) held that the above quoted provision of the Act of May 18, 1920, repeals so much of the provision quoted from the Army Appropriation Act of 1912 as prohibits computing the service of a cadet for the purpose of longevity pay, and gave judgment awarding appellee the sum of $476.66 as longevity pay from the date of approval of the Act of May 18, 1920, to April 19, 1922, the date from which the acounting officers began to pay appellee longevity pay without reference to his cadet service.

The Act of July 5, 1838 (5 Stats. 256) and subsequent legislation, especially that in the Army Appropriation Acts of 1881 and 1882 (21 Stats. 346; 22 Stats. 118) authorized longevity pay *for service in the Army*, and this court held in the Morton case, 112 U. S. 1 (1884) and in the Watson case, 138 U. S. 80 (1889), that West Point cadet service was service in the Army and should be counted for such longevity pay. For all these years such was the law until 1912, when the Honorable James Hay, Chairman of the House Committee on Military Affairs, placed in the Army Appropriation Bill a proviso to the effect that West Point cadet service should not be counted in computing for any purpose the length

of service of any officer of the Army, active or retired, which as finally enacted into law was made to apply, not to officers and cadets already in the service, but only to those to enter the Academy thereafter; that is, after August 24, 1912.

Appellee was appointed by the President a cadet at the Military Academy on August 1, 1913. On the same day he signed the following engagement for military service:

> "I, Daniel Noce, of the State of Colorado, aged eighteen years and nine months, do hereby engage, with the consent of my mother, that from the date of my appointment as a cadet of the United States Military Academy, I will serve in the Army of the United States for eight years, unless sooner discharged by competent authority,"

which engagement for military service is required by Section 1321, Revised Statutes, as follows:

> "Each cadet shall sign articles, with the consent of his parents or guardian, if he be a minor and if any he have, by which he shall engage to serve eight years unless sooner discharged,"

and on the same day he took the oath required of a cadet by Section 1320, Revised Statutes, as follows:

> "Each cadet shall, previous to his admission to the Academy, take and subscribe an oath or affirmation in the following form:
>
> "I, A B, do solemnly swear that I will support the Constitution of the United States and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States, paramount to any and all allegiance, sovereignty or fealty I may owe to any State, county or country whatsoever; and that I

will at all times obey the legal orders of my superior officers, and the rules and articles governing the armies of the United States."

"And any cadet or candidate for admission who shall refuse to take this oath shall be dismissed from the service."

Appellee remained as a cadet at the United States Military Academy until April 20, 1917, when he was duly graduated, and on the same day was appointed a Second Lieutenant in the Corps of Engineers of the United States Army, and has served continuously as a commissioned officer until the present time. He was promoted to the grade of First Lieutenant, Corps of Engineers, May 15, 1917, and to that of Captain, Corps of Engineers, on the same day. On August 23, 1918, plaintiff was appointed a Major of Engineers in the Emergency Establishment, United States Army, was honorably discharged therefrom on June 30, 1920, and reverted to his grade of Captain of Engineers in the Regular Army, which office he still holds.

Appellee is therefore a member of the class first to enter and graduate from the Academy after the enactment of the Hay Provision and, accordingly, the first class to be affected by the above provision which first became actually operative in 1918.

The Military Committees in 1919 found the pay of the Army so inadequate that it had destroyed its morale. The committees reported to Congress that "The heart of the combatant services is gone, producing the gravest situation in our first-line troops." (H. R. 617, 66th Cong. 2 Sess.; S. R. 318). To remedy the situation Congress enacted the said Act of May 18, 1920, which is an Act devoted exclusively to increasing the pay of the Army and the other Services and contains

the proviso here as to which the Court of Claims held, quoting the syllabus, that:

> "The proviso to Section 11 of the Act of May 18, 1920 (41 Stats. 601) by necessary implication repeals so much of the provision contained in Section 6 of the Act of August 24, 1912, 37 Stats. 569, 594, as prohibits the computing of service of a cadet at the United States Military Academy for the purpose of longevity pay."

The Contentions.

Appellant's Contention: That the Statute simply permits *combinations* of service between the Several Services without affecting the various kinds of Service within any of the several services; that is, establishes "equality" between services, ignoring inequalities within them.

Appellee's Contention: That the Statute means what it clearly says: Longevity pay shall be based on the total of *all* service—that is, of whatever kind and in whatever capacity rendered—in *any* or *all*—that is, in one, or more, or all—of said services.

ARGUMENT

Appellant, it seems to us, ignores the plain language of the Statute and proceeds to establish his contention by assuming first what (he thinks) Congress should have intended and then wrenching the language to fit the assumption. We prefer to adhere to the language which Congress used; thereby there is no chance of mistaking its meaning.

I.

THE LANGUAGE OF THE PROVISO TO SECTION 11, ACT OF MAY 18, 1920, IS SO PLAIN THAT THERE CAN BE NO ROOM FOR CONSTRUCTION.

The elementary rule, we think, has never been better stated than by Justice Day in *U. S. v. Standard Brewery,* 251 U. S. 210, 217, when he said:

> "Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the court to enforce the law as written * * *"

We want to quote this language again and have it considered in the light of the rule:

> "That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, Coast and Geodetic Survey, shall be based on the total of all service in any or all of said services."

We submit that English language could not be plainer, simpler, more unmistakable. It is exceptional to find language in a statute, or elsewhere, so absolutely clear—so clear that it has, and can have, but one meaning.

Appellant seems to recognize the exceptional clarity and singleness of meaning of the above proviso. It is significant that instead of proceeding at once to a consideration of the language employed with a view of determining therefrom what Congress intended, he at the outset enters upon a lengthy discussion of moral

and historical considerations, deducing from them what he thinks Congress should have intended; he then assigns to the language a meaning that expresses the intention thus deduced. So it would have to be. Any doubt about the meaning of the language used must be got from some source other than the words themselves; reading them leaves the mind entirely clear and free from all doubt.

II.

APPELLANT CAUSES HIS CONSTRUCTION TO REST ENTIRELY UPON A MEANING WHICH HE ASSIGNS TO THE SINGLE WORD "ANY"—A MEANING WHICH IS UNKNOWN AND UNTENABLE.

1. "*Any.*" Appellant says:

> "The word 'any' does not here mean 'any one.' It means 'some' or 'any two or more.' The latter is one of the meanings of 'any' recognized by the lexicographers."

The Court below rejected such suggested construction, and we surmise it will be quickly disposed of by this Court. We do not say "any" means "one"; we do say it does not mean "two or more" to the exclusion of "one"; we find no such meaning in the Standard or any other Dictionary. Indeed, the Standard's definition of "any," as a pronoun, is: "one or some (indefinitely); one or more persons, things, or portions (indefinitely) out of a number; an indefinite demonstrative; as, "Did you see any of the boys?" The phrase is not "any services", in which "any" is

used adjectively, as appellant reads it, but "any *or all of* said services." When "any" is thus used as a pronoun and partitively (followed by *of* and a plural noun), it must include *one*, no matter how many more. The only question that can arise is whether it means *one only* or *one or more.*

But the phrase used is not "any" but "in *any or all* of said services," which means beyond question that one service is the minimum and all six services the maximum. The only question that might be raised is whether the meaning is limited to *one* of the six on the one hand or to six on the other. In such a case as this, "one or all of said services" means "one, or more, or all." That question was raised and disposed of in *Tarbell and Whitman v. Gifford, et al.*, 79 Vermont, 369, where it was held, quoting the syllabus:

> "In V. S. 1183 providing that, if an execution on a judgment obtained against a partnership, association, or company in its first name is returned unsatisfied in whole or in part, a supplemental suit for the amount unpaid may be brought against 'any or all' of the partners or associates, the phrase 'any or all' means 'some,' however few or many; therefore, such supplemental suit may be brought against *one, or more, or all,* of the partners or associates who were such when the liability merged in the judgment was created."

The contention there made was that the phrase meant one or all, and a motion to dismiss was made on the ground that more than one and not all of the associate members were made defendants. The court, in dismissing the motion, said:

> "We think the term 'any,' as there used in the phrase 'any or all' should not be given its limited

> sense [of one], but its enlarged and plural sense, meaning some, however few or many; an indefinite number. Under this construction, such a supplemental suit may be brought against *one, or more, or all* of the partners, associates or shareholders."

Nor does "some" used partitively, any more than "any" so used, mean "two or more." In *Stiles v. Freeholders,* 50 N. J. L. 11, it is said:

> "As a synonym of 'any,' 'some' applies to *one particular part* in distinction from the rest, 'any' to every individual part without distinction; the former is altogether restrictive in its sense, the latter is altogether universal and indefinite."

Or, it means, certainly in logic, "at least one, perhaps all." (Century.)

2. *"Total."* Appellant finds confirmation of his *combination* or *two or more* idea in this word "total," as meaning the "totalling of services in two or more branches." Such a view again ignores the statute What service is totalled? The statute conclusively answers: *All* service in any one, or more, or all of said services; that is, the total of all service, of whatever kind in whatever service rendered. An officer of the Army may add all his service as recognized by statute in the Army; enlisted man in Regulars, enlisted man in Volunteers, officer of Volunteers, cadet at the Military Academy, contract surgeon, and so on, and to these, if he has served in the Coast Guard, for instance, he may also add the elements of his service there.

3. *"All service." Appellant has to concede also that under his construction "all service" cannot mean "all service" but means "any service in any branch which*

might be counted for longevity and which might thereafter be added to any service in any other branch which might be counted for longevity." (Brief p. 10.)

Considerable qualification of "all," a rather absolute word. It alone should be sufficient to cause the rejection of appellant's construction.

III.

THE LEGISLATIVE HISTORY OF THE HAY PROVISION OF 1912 AND THAT OF THE PROVISION OF 1920, PROPERLY UNDERSTOOD, SHOW THAT IT WAS THE PURPOSE AND EFFECT OF THE LATER PROVISION TO AUTHORIZE THE COUNTING OF CADET SERVICE FOR LONGEVITY PAY AND TO REPEAL TO THAT EXTENT THE EARLIER HAY PROVISION.

As to the "discrimination" in favor of West Point officers, and against others, as to which appellant's Brief assumes so much, little need be said. In fact, it has never existed. With the exception of the Hay report, no mention can be found of such discrimination in the annals of our Government; this, for the simple reason that none ever existed: every other kind of service in the Army counted. It may be observed that since 1912 there has been an extension to include service outside of the Army.

The Hay provision of 1912 does not initiate a policy. It was contrary to what had long existed; it was disapproved by the Department, by all the minority members of the Committee, was struck out by the Senate, and finally passed in its present form after a conference report as part of general legislation on an Appropriation Act which, under the plea of economy, so far

reduced the Army and its pay as to be vetoed by the President "as unwise and dangerous" (House Document 835). The later bill (H. R. 25531), identical with the one that was vetoed, took exactly the same course up to the point of conference, where a few of the larger provisions, such as the reduction of ten regiments of cavalry, were finally eliminated but, by way of compromise, the modified cadet provision was retained.

1. *The Chief Object of the Hay Act of 1912 Was Economy, a Reduction of the Army and Its Emoluments; the Sole Object of the 1920 Act Was to Increase Pay and Emoluments.*

Regarding the necessity of enacting the 1920 Act, the House Committee said (H. R. 617, 66 Cong. 2nd Sess.):

> "The Committee has given the most careful consideration and study to the bill which was referred to it providing for an increase of pay for the personnel of the military forces. The underlying reason for an increase of pay is based upon the extraordinarily high cost of living from which the entire country is suffering. It is unnecessary to enter into details regarding the high cost of living as the facts are only too real to us all, but it is desirable to review the effect that the economic situation has had upon the United States Army. Investigation reveals the fact that the army is in a serious condition. The extraordinarily high cost of the necessities of life has reduced the standard of living to which officers and men have been heretofore accustomed, and there has resulted a state of discontent and low morale in the service * * * officers, non-commissioned officers and privates of

various ranks and grades have all appeared before the Committee and submitted statements showing their actual expenses and income and eloquently testifying to the hardships they were compelled to undergo in order to meet the requirements of their rank and the necessities of the service. Officers find that under present conditions they can not live on their pay and maintain themselves and their families in a modest and decent manner. They are embarrassed to a degree which jeopardizes efficiency. Largely as a result of the distressing situation, more than 2,180 regular army officers have to date resigned their commissions * * * one officer out of every five have resigned. If we consider only infantry and cavalry together, the proportion is one out of every four, and if we consider the field artillery and cavalry, the proportion is one out of three.

"In other words, the heart of the combatant services is gone, producing the gravest situation in our first line troops."

Sen. Rep. 318, 66th Congress, 2nd Session, December 8, 1919, also said:

"Your Committee has given the most careful study to the problem which confronts the personnel of our military forces, growing out of the immensely increased cost of everything necessary to enable one to live with any degree of comfort or even decency. * * * Largely as a result of this distressing situation over 2,100 regular army officers have resigned and left the service and many more are trying to get out."

2. *Congress Said Its Language Placed All Services on an Equality in the Matter of the Computation of*

Longevity (H. R. 948, 66 Cong., 2nd Sess.): Appellant's Construction by Preserving Inequalities Within Each Service and Maintaining the Differences Between the Several Services Makes Such Equality Impossible.

It is difficult to see how things can be said to be equal when there is no like unit of measure for both. Services, after all, are but persons. How can services be said to be on a plane of equality when no one service has equality within its own personnel? As long as there is inequality within a service, that service cannot be placed on an equal plane with another service in which there is also inequality. Some army officers can count their West Point service, others cannot; the same is true of naval officers in respect to Annapolis service. Some Annapolis graduates (on being transferred to the Army, as many are) can count their Annapolis service in the Navy, Marine Corps and Coast Guards but not in the Army. Each service has similar inequalities. It is idle to talk about services being upon an equality when they are so unequal within themselves.

The Court of Claims discussed this point thus:

> "In explanation of this section the managers on the part of the House reported 'it also contains a proviso placing all the service on an equality in the matter of computation of longevity or service pay.' There was an inequality of longevity pay of officers whose appointments as cadets were prior to 1912 and those whose appointments were subsequent to 1912. The service of a cadet appointed in 1911 could be counted for the purpose of longevity, but the service of a cadet appointed after the act of 1912 could not be counted for any purpose in computing his length of service. Section 11 provides for pay for officers in the Coast and Geo-

detic Survey by prescribing the same pay and allowances that are prescribed for the officers of the Navy with whom they hold relative rank, and this same distinction in longevity pay required by the act of 1912 in the case of Army officers is also required in the case of naval officers by the act of 1913 above mentioned, which fact would ultimately lead to confusion and inequality in the pay of the officers in the Coast and Geodetic Survey holding relative rank."

Congress was aware that to get the services on an equality, it must count all service in all services. This it did.

IV.

SERVICE AS A CADET AT WEST POINT IS SERVICE IN THE REGULAR ARMY, AFTER THE ENACTMENT OF THE HAY PROVISION AS WELL AS BEFORE.

That service as a cadet is service in the Army, has been settled by the decisions of this Court. (U. S. v. Morton, 112 U. S. 1; U. S. v. Watson, 130 U. S. 80; U. S. v. LaTourrette, 151 U. S. 572.)

Under existing as well as all previous Army Organization Acts, the cadets at the United States Military Academy are as much a part of the Regular Army as any regiment of the line. The more recent statutes enumerating cadets as component parts of the regular army are the National Defense Acts, 39 Stats. 166; 41 Stats. 759. By statute cadets serve under engagement for service in the Army, under an oath for faithful performance of military duty, and are subject to the Rules and Articles of War.

The Hay provision did not undertake to say that

service as a cadet is not service in the Army; on the other hand it accepted as a premise that service as a cadet was service in the Army but provided that it should not count for longevity purposes (that is, for an increase of service pay, promotion and retirement). The Court of Claims, referring to this, said:

> "Nor does it [the Hay provision] declare that the service of a cadet is not service in the army. On the contrary, it speaks of 'service' and length of service. The same word is used in the Act of 1920. As was said in *Watson's case, supra*, in referring to words used in the Act of 1881 and that of 1838, 'they both mean the same kind of service.'"

V.

THE PROVISO TO SECTION 11, ACT OF MAY 18, 1920, IS UTTERLY AND IRRECONCILABLY REPUGNANT TO SO MUCH OF THE HAY PROVISION, SECTION 6, ACT OF AUGUST 24, 1912, AS PROVIDES THAT SERVICE AS A CADET SHALL NOT BE COUNTED IN COMPUTING LONGEVITY PAY, AND THEREFORE REPEALS THE SAME PRO TANTO.

Quoting them again together:

Section 6 (Act of 1912):

> "That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy or to the Naval Academy shall not be counted in computing for any purpose the length of service of any officer of the Army."

Proviso (Act of 1920):

> "That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public

> Health Service and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services."

Obviously the earlier section, in short, says this:

> (1) Hereafter military and naval cadet service shall not be counted in length of service for any purpose;

whereas the later section, in short, says this:

> (2) Hereafter the total of all service in the Army and Navy and the other forces shall be counted in length of service for longevity pay purposes.

The repugnance between the two provisions affects *longevity pay* only. The former provides that cadet service *shall not* be counted as longevity *for any purpose;* the latter that it *shall* be counted as longevity for *longevity pay purposes.* Such is the extent of the repugnancy. In passing upon this question the Court of Claims said:

> "The Act of 1912 did not limit the meaning of service, but its effect was to carve out of the entire service of the officer that period of service passed at the Military Academy in counting the length of service for any of the purposes, as, for instance, the purpose of lineal rank, or of retirement, as well as for the purpose of longevity pay.
>
> "It refers to any purpose, while the latter act is limited to one purpose, that of providing a basis for computing longevity pay. The Act of 1912 specifies that the cadet service shall not be counted in computing length of service for any purpose. The Act of 1920 is limited to the question of

longevity pay. It may be said, therefore, to form an exception to the more general statement in the Act of 1912. See Rogers vs. United States, 185 U. S. 83, 89. 'The total of all service' in the Army includes service at the Military Academy under the authorities mentioned, and this 'total of all service' is the basis for longevity pay for officers in the Army according to the Act of 1920. This requires all service to be counted, while the Act of 1912 forbids a part of the service being counted. We cannot find the 'total of all service' by excluding part of the service from the computation; a service as a cadet is part of the service in the Army. Morton Case; Watson Case; see also Hartigan Case, 196 U. S. 169; Baker Case, 125 U. S. 646; Cook Case, 128 U. S. 254."

As to longevity pay, the conflict is the conflict between the earlier *shall not* and the more recent *shall*. Both cannot stand; the former must yield. *Tynen's Case*, 11 Wall. 88, 92; *The Paquette Habana*, 175 U. S. 677, 685; *Cook County Bank v. United States*, 107 U. S. 441, 445.

VI

ASIDE FROM JUDICIAL DECISIONS AND LEGISLATIVE DECLARATIONS, AND HAVING REGARD SOLELY TO ESSENTIAL FACTS AND RIGHT AND REASON, CADET SERVICE IS MILITARY SERVICE.

From the organization of the Academy in 1802, the cadets have been as subject to serve wherever ordered as any regiment of the line. The Act of March 16, 1902, 2 Stat. 137, R. S. 1323, provides:

> "Cadets shall be subject at all times to do duty in such places and on such service as the President may direct."

Cadets, it is believed, have served on the battlefield in every one of our wars since the Academy was founded. Cong. Rec., Feb. 16, 1912, p. 2132.

Cadet service at West Point, however tested—whether by its devotedness, its arduousness, its intellectual and physical requirements, its efficiency of results as shown throughout the history of the Army and the Nation, or by any other consideration—is military service in every real and actual sense. This is a truth to which our Government has upon all occasions given official expression and which is established in the general recognition of our people. If it be said that this particular service is but preparatory in character it can truthfully be rejoined that it is no more so than any other military service not in the face of the enemy. All military service consists (1) in preparing to face the enemy and (2) in facing him. The history of our Army shows that cadet service results in unexcelled preparation for facing the enemy and in unexcelled performance in facing him. If, as this court has said, "Longevity pay is founded upon the equivalent of increased judgment and capacity acquired by the experience of continued service" (18 Ct. Cl. 545), then West Point cadet service should be counted in.

CONCLUSION

The sole organic purpose of the Act of May 18, 1920, was to increase the pay of officers of the Army, which Congress now found to be hopelessly inadequate. Section 6 of the Act of 1912 was injected into an annual appropriation act at a time when the proclaimed purpose was, not to increase pay, but to decrease all military expenditures. The provision of

1920 speaks clearly, unmistakably and, as might naturally be expected in view of the diametrically opposite purposes behind the two pieces of legislation, it speaks in terms of positive conflict with the provision of 1912, in respect of longevity pay. Thus speaking, as we respectfully submit it does speak, Section 11 of the Act of May 18, 1920, must prevail.

The judgment of the Court of Claims is right, and it should be affirmed.

Respectfully submitted,

SAMUEL T. ANSELL,

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Attorneys for Appellee.

Washington,
April, 1925.

Euclid.

UNITED STATES *v.* NOCE.

APPEAL FROM THE COURT OF CLAIMS.

No. 360. Argued April 30, 1925.—Decided June 8, 1925.

1. An army officer *held* not entitled to count for longevity pay his service as a cadet in the Military Academy. P. 616.
2. The proviso in § 11 of the Act of May 18, 1920, 41 Stat. 601, "that hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services," does not deal with rules of longevity in any one service but intends to produce equality as between all the services named and did not repeal the provisions in the Army and Naval Appropriation Acts, of October 24, 1912, and March 4, 1913, respectively, directing that service in the Military and Naval Academies shall not be counted in computing for any purpose the length of service of any officer of the Army, Navy or Marine Corps.

58 Ct. Cls. 688, reversed.

APPEAL from a judgment of the Court of Claims allowing recovery of longevity pay by an army officer.

Mr. Assistant Attorney General Letts, with whom the *Solicitor General* and *Mr. Merrill E. Otis*, Special Assistant to the Attorney General, were on the brief, for appellant.

Mr. Samuel T. Ansell, with whom *Mr. Edward S. Bailey* was on the brief, for appellee.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

Daniel Noce was Major of Engineers in the United States Army in the emergency establishment from May 18, 1920, until June 30, 1920, when he returned to a captaincy in the regular establishment. He sued the United States in the Court of Claims for $467.66 as longevity pay, alleged to be due him under the law over and above the pay he received. He was appointed cadet at the West Point Military Academy August 1, 1913. He was graduated April 20, 1917. If he can count for longevity pay his cadet service from August 1, 1913, to April 20, 1917, he will be entitled to the amount he claims from the date of approval of the Act of Congress of May 18, 1920, (§ 11, c. 190, 41 Stat. 601, 603) to April 19, 1922, the period covered by this suit. The accounting officers denied the claim.

The Court of Claims found that under the Act, claimant's cadet service must be counted and gave judgment for him. The United States has appealed and urges a reversal, on the ground that such a conclusion is forbidden by the Army Appropriation Act of October 24, 1912, c. 391, § 6, 37 Stat. 569, 594, which provides:

"That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy, or to the Naval Academy, shall not be counted in computing for any purpose the length of service of any officer of the Army."

A similar provision was made in the Naval Appropriation Act of March 4, 1913, c. 148, 37 Stat. 891, as follows:

"Hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet at the United States Military Academy, who may hereafter be ap-

pointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps."

The Court of Claims held that these two provisions had been repealed by the Act of May 18, 1920, already referred to. The Act is entitled "To increase the efficiency of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey and Public Health Service". It increased the pay of certain commissioned officers of the Army, Navy, Marine Corps and Public Health Service, mentioning in detail the ranks affected and the increases provided. It provided for a temporary commutation of quarters, heat, and light theretofore granted to Army officers on duty in the field to those of the Navy, Marine Corps, Coast Guard and Public Health Service. It gave warrant officers of the Navy an increase, in addition to all pay allowances, of $240 per annum. It increased the pay of all enlisted men of the Army and Marine Corps and of female nurses 20 per centum with certain exceptions. It increased the commutation rations of non-commissioned officers of the Army, of the Marine Corps and of field clerks of the Army and the Quartermaster Corps. It gave a new base pay for enlisted ratings of petty officers and non-commissioned officers and of enlisted men in the Navy, of the Naval Academy band and of the Fleet Naval Reserve. It authorized the Secretary of the Navy in his discretion to readjust the prevailing rates of pay of civilian professors and instructors of the Naval Academy. In § 8 it provided that the Coast Guard should have the same pay ratings to correspond with the Navy and mentioned the officers. Then by § 11 it provided as follows:

"Sec. 11. That in lieu of compensation now prescribed by law, commissioned officers of the Coast and Geodetic Survey shall receive the same pay and allowances as now

are or hereafter may be prescribed for officers of the Navy with whom they hold relative rank as prescribed in the Act of May 22, 1917, entitled 'An Act to temporarily increase the commissioned and warrant and enlisted strength of the Navy and Marine Corps, and for other purposes,' including longevity; and all laws relating to the retirement of commissioned officers of the Navy shall hereafter apply to commissioned officers of the Coast and Geodetic Survey: *Provided, That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services.*"

It is this proviso which it is said repealed the laws of 1912 and 1913 above quoted. It is urged that the words "longevity pay shall be based on the total of all service in any or all of said services" are inconsistent with the exclusion of service in the Military Academy or in the Naval Academy from the calculation of longevity pay.

We are unable to put such a construction on this proviso. The whole Act was intended to promote equality between the six services. After equalizing their pay, it was intended to give any officer or any man in either of the services the benefit of longevity increases for any service which he might have had in any other of the services. The Report of the Managers of the House of Representatives as to § 11 and its proviso (H. R. 948, 66th Congress, 2nd Sess.) said:

"It provides that commissioned officers of the Coast and Geodetic Survey, a highly technical and specialized service, shall receive the same pay and allowances as are prescribed for officers of the Navy with whom they hold relative rank as prescribed in the Act of May 22, 1917. *It also contains a proviso placing all services on an equality in the matter of computation of longevity or service pay.*"

In other words, the longevity pay of a member of any service was to be determined by his total service in any or all of the services. It was not dealing with the rules as to the longevity in any one service. It was to make the calculation of longevity as if the six services were but one service. It was not aiming at any inequality within a service but at an inequality between services. No reference is made to cadet service and nothing to indicate that Congress had it in mind.

The question whether service in either of the Academies was Army or Navy service which should count for longevity pay and retirement was a long standing issue between the officers of the Army and Navy who were graduates of the two academies on the one hand and the officers who were not graduates and the accounting officers of the Treasury on the other. This is evident from the decision of this Court in *United States* v. *Morton,* 112 U. S. 1; and *United States* v. *Watson,* 130 U. S. 80. The legislative history of the Act of 1912 and that of 1913 shows that the question was much contested between the two Houses. The Report of the House Committee on Military Affairs (H. R. 270, 62nd Congress, 2nd Sess.) gives an extended argument against the practice of computing cadet service for pay and retirement purposes. It said:

"The result of this practice is that a graduate of the Military Academy who was appointed a second lieutenant, after having been educated for that appointment for four or more years wholly at the expense of the Government, receives his first 10 per cent increase of pay after not more than one year of service as a commissioned officer, whereas the second lieutenant who is appointed from civil life, after having been fitted for the appointment wholly at his own expense, must serve for five full years as a commissioned officer before he can receive his first 10 per cent increase of pay. And the same disparity between the two cases continues to the end."

After pointing out other discriminations arising from this practice, the report continues:

"It is but just to say that this preposterous practice did not originate with the War Department. It was the result of a decision rendered by the Supreme Court October 27, 1884 (Morton *v.* United States, 112 U. S. 1), to the effect that the time during which a person has served as a cadet is to be regarded as 'actual time of service in the army.'" . . .

After referring specifically to retirement, the report says:

"These are additional discriminations against the civilian appointee who pays for his own preliminary education and in favor of the graduate of the Military Academy who is educated for his commission at the expense of the Government."

In view of this long continued controversy which before 1912 had finally been settled only by two decisions of this Court, it is inconceivable that the two Acts of 1912 and 1913, nullifying the effect of those decisions, and passed after a heated struggle, should have been repealed without mention of the cadet service in the proviso now said to have worked this result. As already pointed out, the Act of which this was a part was detailed in its reference to the commissioned officers, the non-commissioned officers and to the enlisted men of the various six services affected, and to the pay and increases which they were to receive. Had it been intended to increase the "fogey" pay, as the longevity pay is called, for only a part of the commissioned officers of the Army and only a part of the commissioned officers of the Navy, and only a part of the commissioned officers of the Marine Corps in such a specific Act, the favor thus to be conferred upon them would certainly have been set forth in language whose meaning could not be mistaken.

It is, indeed, very difficult to say that there is any real inconsistency between the proviso of 1920 and the Acts of

1912 and 1913. It is supposed to be shown in the use of the words "any or all the services" and it is said that as "any" may mean one or more, it may apply to the Army alone, and can only be satisfied by making it apply to the total service in the Army alone and must therefore mean service in the Army as construed by this Court in the *Morton Case* and the *Watson Case*, in which it was held that, under then existing legislation, service in the Military Academy was service in the Army. This, it seems to us, is a strained method of first finding an inconsistency, by no means clear, if it exists at all, and then erecting it into an implied repeal. Implied repeals are not favored. *United States* v. *Greathouse*, 166 U. S. 601, 605; *Frost* v. *Wenie*, 157 U. S. 46, 58; *United States* v. *Yuginovich*, 256 U. S. 450, 463.

Judgment reversed.